THE COMMODITIES CLAUSE AND THE FIFTH AMENDMENT

SINCE the publication of the June number of this Review for the year 1908, in which appeared Mr. Lewis's paper upon the constitutionality of the Commodities Clause, the Circuit Court for the Third Circuit, sitting in banc, has declared the clause unconstitutional by a vote of two to one.[1] However conclusive Mr. Lewis's reasoning may seem, — and it seems to me quite conclusive, — the decision of this court of high authority must be an excuse for further consideration of the reasoning upon which the clause may be supported.

At the outset some questions may be laid aside, because the defendants themselves seem to concede them. Thus it is not denied that the act affects "interstate commerce," and does not attempt, as did the statute declared void in the Employers' Liability Cases,[2] to affect more than "interstate commerce." It is true that the question was raised whether the act could be said to affect the carriage of coal by a railroad which had already sold it at the breaker, so that the transportation could be said to be of property owned by another. This is really a question of the interpretation of the statute, *i. e.*, whether the carrier can be said to have any "direct or indirect" interest in such coal. So far as it concerns the validity of the statute, if by its terms it covers such a case, it is no different question from that of whether the carrier may transport its own coal.

Again, it seems to be certain that the act is a "regulation" of commerce. It is true that the defendants do not concede this, and it is perhaps somewhat doubtful whether Judge Gray in his long opinion meant to concede it, but that doubt arises from some confusion of ideas about the meaning of "regulation." It perhaps is true that the "power to regulate is not a power to destroy,"[3] when the limitations of the Fifth Amendment are considered, but it is

[1] United States *v.* Delaware & Hudson Company, 164 Fed. 215.

[2] 207 U. S. 463.

[3] Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307, 331.

now too late[1] to insist that Congress has no power to restrict and in part to forbid interstate commerce, when such restriction or prohibition is not forbidden by any other part of the Constitution. It may be assumed, therefore, that there is nothing in the fact that a "regulation" of interstate commerce takes the form of a prohibition of a part of such commerce, which *ipso facto* makes it unconstitutional.

The question then narrows down to this: Is the clause void because it violates any of the limitations upon the powers of Congress? A large part of Judge Gray's opinion is concerned with proving that the Fifth Amendment does apply to the commerce power. He finds that it does, and it seems strange that the contrary should have been urged, as it apparently was, by the Government.[2] Judge Gray seems to have felt some embarrassment by the precedent of the embargo, which he supposes to be within the limitation of the Fifth Amendment, but his conclusion that in general the power to regulate commerce is subject to that amendment cannot be seriously disputed.

In American constitutional law much the greater part of the questions that arise concern the meaning of the words, "no person . . . shall be deprived of his life, liberty, or property without due process of law." It has been tacitly assumed by all parties, in this case, that the limitation upon the power of Congress contained in these words was the same as that imposed upon the states. Since our country was the first which did so impose upon popular assemblies any restraint through a written Constitution, our own precedents are the only ones which are relevant. What are they?

Despite the dictum of Mr. Justice Harlan in Northwestern Life Ins. Co. *v.* Riggs,[3] that the "liberty" of corporations is not protected by the Fourteenth Amendment, there would seem to be no reason to define differently the word "person" when applied to that part of the Bill of Rights which protects "liberty" from that part which protects "property," and it is settled in general that a corporation is a "person" under that clause.[4]

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[1] The Lottery Cases, 188 U. S. 321.

See also for an unanswerable theoretical consideration of this question, Beale and Wyman, Railway Rate Regulation, § 1336.

[2] Monongahela Navigation Co. *v.* United States, 148 U. S. 312; United States *v.* Lynah, 188 U. S. 445; McCray *v.* United States, 195 U. S. 27, 61.

[3] 203 U. S. 243, 255.

[4] Pembina Mining & Milling Co. *v.* Pa., 125 U. S. 181; Gulf, C. & S. F. Ry. Co. *v.* Ellis, 165 U. S. 150, 154; Smyth *v.* Ames, 169 U. S. 466, 522; Charlotte, etc., Ry. *v.* Gibbs, 142 U. S. 386, 391; St. L. & San F. Ry. *v.* Gill, 156 U. S. 649, 658.

There are a number of other decisions upon this point, which it hardly seems neces-

It is a different question whether the state has greater power under "due process of law" over corporations than over individuals, and that question should not be confused by asserting that the word "persons" has a different meaning, though used but once in the Amendment in question. It cannot be wrong, when supporting the act, to assume that the dictum does not create such a distinction.

The word "liberty" seems now, and after Allgeyer *v.* Louisiana,[1] to have got its broader and less historical meaning, and to include the right of a "citizen"— which in this connection is used as "person" — "to enter into all contracts which may be proper, necessary, and essential to his carrying to a successful conclusion" the pursuit of "any livelihood or avocation."

There are two ways in which may be regarded any valid restriction of the "liberty" so defined: one, that where the restriction is "lawful," he has not the "liberty" to do what is unlawful;[2] and the other, that though the person is deprived of his "liberty," nevertheless he is accorded "due process of law." Though the result is the same, the second method is preferable, as it does not introduce a *petitio principii* into the definition of the word "liberty," by defining it as the right to enter into "lawful" contracts, when the question at issue is whether or not the activity forbidden is "lawful."

It seems then clearest to treat the validity of the Commodities Clause as though the Fifth Amendment did forbid it as a deprivation of the "liberty" of railroad corporations, unless the act was "due process of law."

The next preliminary consideration is whether it likewise deprives such railroads of their "property." This consideration is really irrelevant if the definition in Allgeyer *v.* Louisiana[3] be law, because under that definition they are deprived of their "liberty" in any case; and it can only be supererogation to show that they are likewise deprived of their property. But such a limitation upon property rights as is involved in a prohibition to transport their own property is less of a "taking" or "deprivation"

sary to cite. None of these turned upon the point of "liberty." If it was the deliberate purpose of the whole court to distinguish between liberty and property when used in the "due process" clause, it would seem as if such a distinction deserves larger notice.

[1] 165 U. S. 589. I am assuming a corporation's liberty is protected.

[2] Mr. Justice Peckham in U. S. *v.* Joint Traffic Association, 171 U. S. 505, 572.

[3] *Supra.*

than to forbid one to sell liquor theretofore legally owned. There are of course many restrictions which Congress may put upon the use of property short of "depriving" the owner of it.[1] These questions really are important chiefly when the question arises of what is the justification for the taking. Thus, the destruction of property to prevent the spread of a conflagration, or to abate a nuisance, may be a complete "taking," and yet it is legal and the owner has no redress except in the public sense of justice. Even granting that the entire destruction of property must be paid for by a just compensation, the losses arising from incidental limitations in the uses of property are not subject to such a condition when they are necessary to a useful purpose.

The question comes, therefore, to this: Is the Commodities Clause "due process of law"? It is conceded by all sides that it can be supported, if at all, only as an incidental means of regulating the duties of common carriers. The Act to Regulate Commerce[2] to which it is an amendment has for its purposes to secure, first, equal rates and means of transportation for all shippers, and, second, the regulation of rates. That this purpose is within the legitimate powers of Congress was expressly conceded by the defendants and has been implicitly recognized by the court in numerous cases.[3]

If there is a reasonable or necessary relation between the general purpose of securing equal treatment for shippers and of regulating rates, and the provisions of the clause itself, then it must be a valid enactment, since the grant of a power implies all those ancillary powers which are necessary or appropriate to its exercise.[4] All the discussion which has arisen about the act resolves itself into the single question whether or no the clause is such a necessary or appropriate incident as the court may see to have a "real or substantial relation"[5] to these purposes.

The argument against the act is that while under New Haven

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[1] Mugler *v.* Kansas, 123 U. S. 623; Crowley *v.* Christensen, 137 U. S. 86; Transportation Co. *v.* Chicago, 99 U. S. 635.

[2] 24 Stat. 379; 34 Stat. 584.

[3] New Haven Ry. Co. *v.* Interstate Commerce Commission, 200 U. S. 361; Interstate Com. Com. *v.* Cincinnati, N. O. & T. P. Ry. 167 U. S. 479; Interstate Com. Com. *v.* Louisville and Nashville Ry., 190 U. S. 273; Southern Pacific *v.* Interstate Com. Com., 200 U. S. 536; Gulf, Col., etc., Ry. *v.* Hefley, 158 U. S. 98; Tex. & P. Ry. *v.* Mugg, 202 U. S. 242; Tex. & P. Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426.

[4] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316.

[5] Mugler *v.* Kansas, 123 U. S. 623.

Ry. Co. *v.* Interstate Commerce Commission,[1] Congress has the fullest power to prevent any actual discrimination, the clause forbids all transportation of its own products by the carrier whether discriminatory or not; that it cannot be assumed or presumed that the carrier will *certainly* and in every case abuse his power and violate his public duties, but rather it must be presumed that he will not; that to forbid all such traffic is to condemn the innocent with the guilty and has no necessary or even reasonable relation to the securing of the chief purpose of the act.

The answer to this reasoning is twofold: first, that the clause is designed not to punish offenders of the act in general, but to remove an obvious motive of partiality in the conduct of those who exercise public duties; and, second, to obviate the difficulty of detecting actual offenders by prohibiting a kind of business in which offenses are most likely to arise.

As to the first of these purposes the question arises whether the situation of the carrier is analogous to that of a trustee or other fiduciary, or of a public officer, who has a personal pecuniary interest in the exercise of his duties. If there is an analogy, it cannot fairly be said that the clause has no just basis in the law, because it has for long been a principle not only of judge-made law, but of statutes, that a fiduciary, private or public, is not free to have any personal interest in the discharge of his duties. His temptation to favor himself at the expense of the beneficiaries whom he represents, makes all such transactions illegal. Under the rule in Murray *v.* Hoboken Land Company,[2] "due process of law" is customary and usual process of law, — the kind of regulation of conduct which as a society we have inherited and to which we are accustomed. If the analogy suggested is well chosen, Congress has done no more than subject the railroads to the same limitations which from early times have been imposed upon all other public servants under our inherited system of law. The statute, in that case, is no other than the statutes which forbid federal officials from having any pecuniary interest, direct or indirect, in any contract which they must make in the discharge of their duties. That the clause goes into effect after these public servants have invested great sums upon the assumption that they might retain their ambiguous position, is no reason to deny the power to Congress to terminate their practice. Although they may be entitled to some consideration because of a long immunity,

[1] *Supra.*

[2] 18 How. (U. S.) 272.

they can appeal only to the sense of justice of Congress. Its failure earlier to observe that the practice was undesirable, or its failure to act, can give no vested rights to public servants to continue the practice. It is as if no statute forbade public officers from being interested in government contracts, so that the practice was not illegal; and, in reliance upon that immunity, certain of those officers had built up a large business of dealing with themselves. Surely, they could not insist that an act was invalid which forbade them to continue that business in the future. If they had any claims to be protected against the ensuing loss, such claims would not result in taking from Congress the power to stop so undesirable a practice. The due process of law accorded such officers would be precisely the process accorded all public officers or other fiduciaries, since the time whereof the memory of man runneth not; only they had enjoyed an immunity for the time being, due to the indifference or ignorance of Congress.

However, I have hitherto assumed, without considering, that a railroad which has the right to transport its own products is in a position analogous to that of a public officer who is interested pecuniarily in the performance of some of his duties. Its duties are to transport goods offered, to charge reasonable rates, and not to charge less than the established rates to any shipper. In what ways does the ownership of its own products create a contradictory interest in the carrier? First, the railroad can favor the transportation of its own goods by refusing to carry the goods of others, when pressed for adequate facilities to meet all demands. It is beyond the power of most human nature in such a case to hold even the scales of impartial distribution and to let a part of its own product go unmarketed in a high market, that competitors may successfully compete. Second, it may market its own product at such figure as it pleases, its apportionment between sale-price and carriage being mere matter of book-keeping. By so controlling the market it can in the end get a monopoly of the supply,[1] which is the very thing that has happened in the case of these coal railroads, who allege in their answers that they now control nearly ninety per cent of the anthracite coal in Eastern Pennsylvania. It is true that if the competing shipper can show that the total price received for product and carriage is less than the fair market value plus the established tariff, he can obtain relief,

[1] New Haven Ry. Co. *v.* Inter. Com. Com., 200 U. S. 361; Attorney General *v.* Great Northern Railway, 29 L. J. Eq. (N. S.) 794.

but the wrong is then done him and it is to remove the incentive to that wrong that the clause was enacted.

It cannot then be seriously contended that the situation of an owner-carrier is not analogous to that of any other fiduciary who is interested personally in the discharge of his duties. His duties are to treat all equally, and his interest is to market his own goods with greater convenience and at lower rates than his competitors' goods. Indeed, it is enough that shippers over his line are his competitors to bring at once into evidence the fact that he cannot occupy an impartial position. It is not enough, therefore, to show that in a given case, or that in many cases, the railroads have discharged their duties impartially, were such proof possible. That would not in the least affect the force of the fact that they never could be free from a bias, under which the law does not permit any other fiduciary, private or public, to perform his duties, and from which the railroads have no right to assume that they are immune.

The second defense for the act is that it will prevent the commission of what would be conceded wrongs, but which are difficult of discovery or punishment. The facts are peculiarly within the carrier's knowledge. It is only by an inquisition that one can ascertain whether the service rendered a shipper is all that he can fairly ask, and whether or not he is being oppressed either to give the carrier's trade the first facilities or to drive him to terms. It is, of course, true that to forbid the carrier from carrying his own goods may result in preventing much carriage which is quite innocent, and not within the purview of the act at large. It is, however, by no means unheard of in our law, and therefore out of its "due process," to forbid conduct which may be the overt evidence of either an innocent or a guilty act, but as to which it is difficult to know whether it is in fact the one or the other. The curtailment of the liberty of the innocent citizen is justified by the prevention of wrongs which are impossible to detect.

Thus we all know that the carrying of concealed weapons, or the possession of burglarious tools, of counterfeit money, or of game out of season, is each criminal, though all may be quite harmless in the individual case.[1] On the whole, there is reason to

[1] The very recent case of Silz *v.* Hesterberg, 211 U. S. 31, 40, holds that the possession of game shot without the state even when distinguishable from game shot within the state may be forbidden, in the interests of a general protection of the state's own game supply. It is in point here. See also Lawton *v.* Steele, 152 U. S. 133.

believe that they are not innocent in the majority of cases, and the state may prevent much wrong at the expense of little hardship. As in much other legislation, the result is determined by an account in which there is a debit, as well as a credit, column.

Similarly, the purpose which justifies the Statute of Frauds depends upon the fact that the oral evidence accessible for contracts is doubtful and difficult to procure. Many good contracts go by the board that false contracts may not be foisted upon the citizen. His "liberty" to make a valid oral contract is taken from him because he is protected in the end more completely.[1]

Indeed those cases seem to be in essence indistinguishable in which a statute is passed making certain facts presumptive of others;[2] because although such statutes do not determine the matter conclusively, none the less the person, against whom the presumption obtains, in many cases may be totally unable to rebut it, and that too in a case where the actual facts do not accord with the presumption. The distinction between such cases as lay down the rule absolutely, and such as make it only presumptive, is therefore not thoroughgoing, if it be not due process of law to deprive one of one's liberty in order to establish a general rule which in the majority of instances will effect a desirable result. The same reasoning must apply to all legal presumptions.

The "oleomargarine" cases illustrate an application of the same principle.[3] In these cases the court upholds the right of a state, if it does not impose any regulation on interstate commerce, to forbid the sale of oleomargarine, even though harmless, without some distinguishing mark. It would seem that to insist upon such a distinction in the sale of this harmless but somewhat ambiguous product is justifiable only because it is an easy subject of substitution for butter. Much oleomargarine will be frankly sold as such; not all will be fraudulently substituted for butter, and the "liberty" of the citizen to sell undistinguished oleomargarine is certainly taken from him by a law which compels him to color it pink, or to mark it in any other way. If such a law be valid, there is no

[1] For an interesting case of similar character, see Rhodes *v.* Sperry & Hutchinson Co., 193 N. Y. *circa* p. 200 (case not yet reported).

[2] People *v.* Cannon, 139 N. Y. 32.

[3] Powell *v.* Pennsylvania, 127 U. S. 678; Plumley *v.* Massachusetts, 155 U. S. 461; Capitol City Dairy Co. *v.* Ohio, 183 U. S. 238; McCray *v.* United States, 195 U. S. 27, 62. The case of Schollenberger *v.* Pennsylvania, 171 U. S. 1, did not mean to overrule the earlier cases and went off wholly upon the question of how far the act affected interstate commerce.

just ground for it, except that the opportunities for fraud are so great as to counterbalance the hardship imposed upon the honest sellers.[1]

In the case of the Commodities Clause the same reasoning applies. It is certainly not for the courts to say that the practice of transporting its own products by a railroad does not lend itself to a violation of the law against discrimination, which it is impossible or difficult to detect. That such discrimination may go long undetected is shown by New Haven Railway *v.* Interstate Commerce Commission,[2] and will not indeed be disputed. Whether that danger is of enough importance to justify so drastic a measure as the total prohibition of the trade, would seem to be exclusively a matter for the legislature.

Much of the discussion about the clause has turned upon the scope of the "police power," and its possession by Congress. I have tried to avoid the use of that term because its meaning is so vague that it too often clouds discourse, but it is impossible wholly to leave it unconsidered, since it is the basis of many of the decisions which have been cited. If by the term is meant only a portion of the legislative power, then it is not coincident in meaning with "due process of law." On the other hand, it may mean what Chief Justice Taney says: "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominion. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws."[3] Again consider the recent declaration of Mr. Justice Harlan in Halter *v.* Nebraska:[4] "Each State, when not thus restrained and so far as this court is concerned, may, by legislation provide not only for the

[1] A somewhat similar kind of provision is the establishment by "standards" of the excellence of articles of food, even when it excludes wholesome articles in a given case. Buttfield *v.* Stranahan, 192 U. S. 470.

[2] 200 U. S. 361.

[3] The License Cases, 5 How. (U. S.) 504, 583.

[4] 205 U. S. 34, 41.

health, morals and safety of its people, but for the common good, as involved in the well-being, peace, happiness and prosperity of the people." If it means this, then the matter is not advanced by saying that the legislature is using its police power. "Due process of law" will, therefore, mean the kind of regulation proper and customary for legislatures,[1] and that is the police power in its fullness. The theory that there is a peculiar cogency, or immunity from constitutional limitation, to legislative enactments within the police power cannot survive such definitions as include in that power the "general welfare," "prosperity," "wealth," and "convenience" of the people.

Therefore a decision which holds that some act is within the police power must in the end be regarded as holding that it is "due process of law," and there seems no gain in adding so confusing a term to this discussion, or indeed to any other. It is so pregnant with question-begging, so vague and so variously phrased in definition, that it is not too much to say that from it have arisen most of the difficulties that lead to such obscurity and conflict in what might otherwise be reasonably intelligible.

To a consideration of the Commodities Clause one thing remains, and that, the chief real difficulty in the way of its constitionality; that is, the exception of all lumber from its operation. Several attempts at justification have been made. Judge Buffington in his dissenting opinion in United States *v.* Delaware & Hudson Company,[2] suggests that there is no need of including lumber, since it is transported by water. Mr. Lewis says in his paper,[3] that in the case of the transcontinental roads their timber lands were given by Congress as an inducement for construction, and that they must have the right to carry the growth over their lines. Neither excuse is adequate, for much lumber is in fact carried by rail, and the grant of timber-lands was subject to the same congressional powers as any other property. Have not the owners of the alternate timber sections bordering the Northern Pacific Railway the same right to protection against discrimination as the few independent coal operators of Pennsylvania? No substantial reason can be given why they should be subjected to possible oppression from which others are relieved.

Moreover, the objection has an added seriousness because under

[1] Murray *v.* Hoboken Land Co., 18 How. (U. S.) 272.

[2] 164 Fed. 215, 258.

[3] 21 HARV. L. REV. 616.

the Fourteenth Amendment such legislation would be void,[1] unless some reasonable ground could be shown for the exception. In those cases as in others where discrimination has been the cause of the statute's invalidity,[2] the decision was placed upon the clause of the Fourteenth Amendment which does not appear in the Fifth: "nor deny to any person within its jurisdiction the equal protection of the laws." Therefore, unless the court is to invent some distinction in the nature of things which certainly does not appear upon the surface, it must face the serious question of whether, because of the omission from the Fifth Amendment of the "equal protection" clause, Congress may make arbitrary distinctions in the protection which it extends to persons equally situated; that is, that it may protect some shippers but not all, though all need protection.

So far as concerns the shippers themselves such a law does not deprive them of property or liberty. Such disadvantages as they labor under are the result of their economic position, not of the action of Congress, which has only failed to relieve them when it should. Congress cannot, by such inaction as to them, take away their property or their liberty. Therefore the clause is not within the Fifth Amendment because it excepts from its protection the shippers of lumber.

The railroads say, however, that any law which imposes even a proper burden unequally is not "due process." Of course, this is not the imposition of a burden whose inequality makes itself heavier upon those who alone suffer it. The railroads would not be in any measure relieved if they were likewise forbidden to carry lumber. Yet it would seem that if the railroads could with justice say that there was arbitrary favoritism in the statute in excepting certain railroads from its burdens without any good reason, the law might still come within the rule in Connolly *v.* Union Sewer Pipe Company.[3] The railroads' "liberty" is indeed "taken," and a law which denies to them "equal protection" would probably be regarded as denying to them "due process" for that reason.[4] While the court has at times been very astute to find some possible ground for distinctions made by the legislature,[5] still the rule remains unim-

[1] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540; Gulf, C. & S. F. Ry. *v.* Ellis 165 U. S. 150; National Cotton Oil Co. *v.* Texas, 197 U. S. 115.

[2] Cotting *v.* Kansas City Stockyards, 183 U. S. 79.

[3] 184 U. S. 540.

[4] Duncan *v.* Missouri, 152 U. S. 377, 382.

[5] Ozan Lumber Co. *v.* Union County Bank, 207 U. S. 251; M. K. & T. Railway *v.* May, 194 U. S. 267; Cook *v.* Marshall County, 196 U. S. 261.

paired that there must be some conceivably rational basis for the distinction.

But there is a very fundamental difference between the discrimination effected by the act between the shippers and that effected between railroads. The discrimination between shippers divides them into classes, since the shippers of lumber are not protected, while all others are. Were it not for the absence of the "equal protection" clause, they would come within the rule in Connolly *v.* Union Sewer Pipe Company. As it is, the denial of equal protection to them is irrelevant, because neither their property nor their liberty is affected by the act, and the Fifth Amendment only protects their liberty and their property. The discrimination does not so divide railroads into classes, however, because it affects all equally in so far as they are or may become lumber owners, and any of them may be such, and most of them probably are already so in some degree.

Now, under the rule in Cox *v.* Texas,[1] the rule of Connolly *v.* Union Sewer Pipe Company,[2] is confined to such statutes as effect arbitrary distinctions between classes of persons, and the rule does not extend to the imposition of an arbitrary burden upon a part only of the activity of all classes generally. In that case a Texas statute regulating the sale of liquor had excepted from its operation sales by producers of wine made from Texas grapes. The court said that the point had not been pressed of the discrimination between the producers of Texas wine as sellers and other sellers of Texas wine. They said that the point actually urged was between the sellers of foreign wine and that of Texas wine, and that, as it did not appear that there was any class consisting of sellers only of Texas wine, and another class of sellers only of foreign wine, but as, on the contrary, it appeared that wine-sellers sold foreign or domestic wine indiscriminately, the discrimination in the statute, even if arbitrary, was not such as the Fourteenth Amendment affected, because it did not deny to any class of persons the equal protection of the law.

This decision seems to be directly in point in the case of the Commodities Clause, since the discrimination effected by the lumber exception affects equally all railroads, in so far as they are or may become lumber owners, and does not cut out any particular class of railroads from the burden of the act, except as they may by chance happen to be lumber owners.

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[1] 202 U. S. 446. [2] *Supra.*

Although the point is a narrow one, it would seem, therefore, that neither in respect of its effect upon shippers nor in respect of its effect upon railroads is the exception fatal to the act, even though it be regarded, as I think it must, as being based upon no rational distinction. It is no answer to say that the Constitution does not permit arbitrary discrimination. It permits Congress to act within its powers except as they are limited. Many abuses may exist against which the courts cannot relieve, and for which the only remedy is in such popular feeling as may be reflected in congressional action. The Constitution does not create the courts as certain safeguards from all legislative injustice, but only to keep the legislature within its proper powers. It may use those powers unwisely or unjustly, and the courts have no right to interfere. In this case the evil may be in fact exaggerated, the necessity for so stringent a remedy may not exist, the statute may bear unequally, and much damage may be done to innocent persons. Not all these considerations together have any proper weight with a court, and none of them lends any actual weight to the argument against the act's validity.

However little this should be, it is indubitably the fact that such considerations largely determine the decisions, and the defendants made liberal use of this appeal to the sentiments of the court, an appeal whose success was clearly enough reflected by the prevailing opinions. It cannot be out of place in closing to consider the claims of the defendants to especial consideration. As Judge Buffington points out,[1] the defendants since 1874 have transported all their coal in violation of the direct and express provisions of the constitution of the state of Pennsylvania. Any claim of hardship must be limited to such ownership as antedates that period. The fact that the legislature of Pennsylvania has never passed the laws necessary[2] to the operation of the clause is wholly beside the mark, because the roads remained subject to such regulation whenever the legislature awoke to its duty. They can claim no indulgence because of the legislative inaction.

The gravamen of the defendant's appeal consists in the assertion that many millions of dollars of their property will be destroyed. Let us suppose that in an attempted compliance with the statute they distributed to their shareholders certificates of interest in coal lands, or coal shares, similar to the "ore certificates" issued some

[1] P. 253.

[2] Commonwealth *v.* N. Y. L. E. & W. R. R., 132 Pa. 591.

time since by the Great Northern Railway under no compulsion whatever. This would require the conveyance of title in the lands, or in the shares, to trustees, but the shareholders would in the end hold the same proportionate interest in the coal through "certificates" as they did formerly through their ownership in the stock. Two questions arise as to this: would it "deprive" the carriers of their "property;" and, would it comply with the act?

The legal title of the property would by hypothesis pass from the carriers and be vested in trustees. The ultimate beneficial interest would remain the same. In the case of the Great Northern Railway no contest was made — or at least none was made in good faith — when the change took place. It was recognized as a legitimate method of internal management, and no one considered that his "property" had been affected.

It may be that such a distribution would affect the value of the securities; but it is important to remember that some of the decrease in value may be the measure of that very advantage of discrimination and of ultimate monopoly which it is the purpose of the act to destroy. In so far as the fall in such shares reflects the popular estimate of the loss in the carriers' ability to market their coal upon more advantageous terms than independent shippers, and to control all the anthracite supply, in just so far the "property" so "taken" consists only of their practical security from detection in the commission of crimes. That is a "property" which the court cannot consider.

There are other difficulties which may probably cause trouble. All of the coal roads are mortgaged, and some uncertainty will certainly arise as to the marshalling of the lien between the coal and the railway shares. In some of the mortgages the railway covenants not to part with the coal properties, and a question may arise as to the violation of that covenant. No one can seriously suppose that this question would remain long at issue between the bondholders and the shareholders, if the alternative were, as it appears to be, the total discontinuance of mining coal. There is little doubt that these questions, and perhaps others not now known, may cause a decided fall in the value of coal-road shares and a corresponding loss to many persons. That is by no means a "taking" of the stockholders' "property," and it is no ground for the moving pictures of destruction and coal famine with which the defendants appealed to the Circuit Court. The coal will continue to be mined, and the shareholders will not find their property con-

fiscated except in so far as that property consisted of a pecuniary interest dependent wholly upon a practice which has already been illegal for thirty-five years.

But this brings us to the second consideration,—whether such a distribution among shareholders would be an adequate compliance with the Commodities Clause. That it would be a literal compliance cannot be questioned. The titles would be vested in separate "persons," and the beneficial interests would at once be separately transferable, and would be in fact soon transferred to some extent into separate hands. It is, however, most likely that the actual majority control of both sets of shares would remain in the hands of one set of persons. In the case of the Northern Securities Company the court[1] decreed that the shares of the two roads be distributed *pro rata* to all shareholders, and this was subsequently done after some further litigation.[2] There is little doubt that the majority of the shares of each road still remain owned by the same persons, and that the means of repressing competition still exist nearly as effectively as before. Yet the Sherman Act is no longer violated.

In the event of a distribution such as suggested, the temptation to discriminate would remain, and the difficulty of detection. So long as there remained a unity of ownership in the majority of the stock of both the coal properties and the roads, little would seem to be accomplished of the purpose which actuated the clause, and yet, in analogy with the Sherman Act, it could not be said that the roads had not complied with the law. There would at least be a minority of stockholders of the railroad not concerned in the coal property, whose interest would induce them to prevent favoritism, so far as they could discover it, and who could prevent it if they did discover it. Their presence would certainly be an added impediment to the success of such discrimination.

However efficient the present clause may be, it goes no further than to require what has been suggested. It is no matter for the court to decide whether or not it goes far enough. Should subsequent experience prove the necessity of a further statute forbidding the ownership by the same persons of both coal and railway shares, that statute must stand upon its own feet and meet its own difficulties, which would be great in practical execution if not in constitutionality. In any case the Commodities Clause is not such

[1] Northern Securities Company *v.* United States, 193 U. S. 197.

[2] Harriman *v.* Northern Securities Company, 197 U. S. 244.

a statute. It calls for no more than an independent ownership of coal and railroad. That is one step towards a complete divorce of interest between carrier and shipper. It may prove step enough, or it may lead to further progress. It is as far as Congress has as yet gone, and no injustice is involved in taking it.

Learned Hand.

NEW YORK.